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In the

Supreme Court of the United States

No. 632

H. H. TUCKER, JR., and NELLIE M. TUCKER,
Appellants,

v.

J. MORGAN BAKER, *et al.*,
Appellees.

APPLICATION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

DEXTER HAMILTON,
1625 Kirby Building,
Dallas, Texas,
Attorney for Appellants.

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To the Honorable Supreme Court of the United States of America:

This is the petition of H. H. Tucker, Jr., and Nellie M. Tucker, for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit, at New Orleans.

STATEMENT

This case was first decided by the United States District Court for the Northern District of Texas, Fort Worth Division, on the 5th day of February, 1948. An appeal was prosecuted by the appellants to the United States Circuit Court of Appeals, Fifth Circuit, and that Court reversed the decision of the United States District Court with instructions to enter a judgment not inconsistent with its decision.

The case was returned to the United States District Court with these instructions, but the Court did not observe the instructions embraced in the mandate of the Circuit Court of Appeals and again, on October 17, 1949, entered substantially the same judgment it had entered originally. From that judgment appeal was prosecuted to the Fifth Circuit Court of Appeals and that Court, without any additional testimony, reformed and affirmed the judgment of the District Court, which had originally been reversed and remanded with instructions.

JURISDICTION

The rules of this Honorable Court require the review of the decision of the Circuit Court of Appeals last rendered because three other Judges, to-wit, Holmes, Waller and Lee, had rendered the decision on the first appeal, which is in direct conflict with the decision from which we appealed, rendered by Hutcheson and Borah and dissented to by Judge McCord, which constitutes a decision by a Circuit Court of Appeals in conflict with a decision of another Circuit Court of Appeals on the same matter.

NATURE OF THE CASE

This was filed as a voluntary reorganization proceeding under Chapter 10, of the Bankruptcy Act as Amended, pp. 501-676.

The Trial Court, after hearing evidence, including admission by the alleged debtor, that the trust estate was not insolvent, found that the petition was filed in good faith and adjudicated it a bankrupt.

An appeal was prosecuted from this decision by the appellants and the Court of Appeals reversed the decision of the Trial Court and remanded the case for further proceeding not inconsistent with that Court's opinion, and found that the petition was not filed in good faith and that the evidence clearly established that it was not insolvent. *170 Fed. 2d 939.*

On a second hearing of the case by the Trial Court a judgment was entered on October 17, 1949 continuing the bankruptcy proceeding in force and continuing the stay orders previously entered by it, which the Court of Appeals had held should be set aside.

The appellants prosecuted a second appeal from this second judgment of the Trial Court, which was entered without any testimony whatsoever, and the Court of Appeals held that the stay orders which had been entered by the Trial Court were erroneous, but that the bankruptcy order was properly entered and might not be set aside. (Tr. 122.)

FIRST ASSIGNMENT OF ERROR

The Circuit Court of Appeals committed fundamental error in continuing the bankruptcy reorganization after three other judges of the same court had finally adjudicated the bankruptcy proceeding to have been filed in bad faith, and no additional evidence having been presented to sustain the proceeding.

SECOND ASSIGNMENT OF ERROR

The ruling in this case, Judge McCord dissenting, being in direct conflict with the decision by Judges Holmes, Waller and Lee, based on the same record and without any additional evidence whatsoever, requires that this Honorable Court pass upon and determine the issue of jurisdiction of the District Court to adjudicate the so-called debtor a bankrupt.

BRIEF OF THE CASE

In the original hearing of this case by the United States District Court, the District Court found, as it was compelled to do before it could adjudicate the Texas American Syndicate a bankrupt, that the Texas American Syndicate was insolvent. An appeal from the decision was taken to the Circuit Court of Appeals by Tucker, et al., as appellants, and was presented to Judges Holmes, Waller and Lee. A decision in the case was rendered on December 7, 1948 by the Circuit Court of Appeals, Circuit Judge Holmes wrote the opinion, which was unanimous. *170 Fed. 2d 939*. That Court held that the petition was not filed in good faith and should be set aside, and the case was reversed and remanded for further proceeding not inconsistent with that opinion.

When the case was sent back it was again argued before the Trial Court without any additional evidence of any nature being submitted. A petition for receivership

was filed by some of the parties. All of the allegations of the petition for a receiver were denied under oath by Defendant Tucker and no receiver was appointed, nor was any evidence pertaining to it introduced.

The Trial Court continued in effect and force the bankruptcy decree originally entered in the case. *185 Fed. 2d 863.*

On the second appeal the original decision of the Circuit Court of Appeals was set aside by two of the Judges sitting in the case, Judges Hutcheson and Borah, but, as stated in the application, Judge McCord dissented without writing any dissenting opinion. A dissent was likewise entered by Judge McCord on the motion for rehearing.

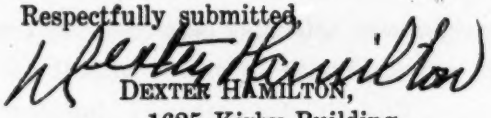
Thus, as appears from the record, four Judges of the Circuit Court of Appeals thought the Trial Court's judgment was erroneous and should be set aside, while only two members of the Appellate Court thought it ought to be modified and affirmed.

The action of the majority of the Judges of the Circuit Court of Appeals handing down the last decision of the Circuit Court of Appeals, has rendered a decision in conflict with the decision in the same case, on the same facts, on a former appeal.

We respectfully submit that the last opinion, written by Judge Hutcheson, cannot be correct if the former were correct.

WHEREFORE, we respectfully pray the Court that upon consideration of the record in this case this Honorable Court set aside the opinion of the Circuit Court of Appeals, dated December 26, 1950.

Respectfully submitted,



DEXTER HAMILTON,
1625 Kirby Building,
Dallas, Texas,
Attorney for Appellants.

A copy of this Application for Writ of Certiorari has been mailed to: Mr. J. Hart Willis, Dallas, Texas; Mr. J. B. Wade, Fort Worth, Texas; Mr. John B. Stigall, Dallas, Texas; Mr. Garth B. Melson, Indianapolis, Indiana; Mr. W. E. Allen, Fort Worth, Texas; Mr. Charles S. Hopkins, Olean, New York.

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No. 632

H. H. TUCKER, JR., AND NELLIE M. TUCKER,
Petitioners

vs.

J. MORGAN BAKER, ET AL,
Respondents

BRIEF FOR RESPONDENTS in OPPOSITION to PETITION for CERTIORARI

J. HART WILLIS,
J. B. WADE,
L. L. GAMBILL,
Attorneys for Respondents.

WILLIS & LEWIS
Dallas, Texas
ALLEN, GAMBILL & GAMBILL
Fort Worth, Texas
Of Counsel.

Fort Worth Brief Printing Co., 1013 Monroe Street Phone FA-4070

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OPINION BELOW

The Opinion of the United States Court of Appeals, Fifth Circuit, is in 185, Fed. (2d) 863.

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STATEMENT

We do not concur in the statement of petitioners but we believe the contention of respondents can best be presented by a brief statement of the proceedings below.

Texas American Syndicate, a business trust, was organized by H. H. Tucker, Jr., designated as sole Trustee, under a Trust Indenture dated March 15, 1922, to engage principally in the real estate and oil business. In the course of his promotions, Tucker issued some twenty-five separate types of certificates of interest in the enterprise, which he disposed of to persons residing in different parts of the United States. He became involved to such an extent that he resigned as Trustee and a Receiver was appointed by one of the State Courts of Texas for the Syndicate. Thereafter, Karl A. Crowley was appointed successor Trustee un-

der the Trust Indenture and the receivership was closed. It soon developed that the affairs of the Syndicate were badly involved and the beneficial ownership of its assets was uncertain because of the various forms of certificates issued by Tucker, and the questioned validity of many of said certificates. The books and records showed that the Syndicate had some eight thousand (8000) unit holders holding various forms and types of certificates of interest in the Trust. While the Syndicate owned valuable properties consisting of some 62,000 acres of land in Texas, the greater part of this land was involved in litigation and some of it was encumbered.

On October 31, 1947, Crowley, as sole Trustee, filed a petition for reorganization of the Syndicate under Section 10 of the Bankruptcy Act, which petition was accepted by the District Judge and the Trustee was continued in possession of the properties. H. H. Tucker, Jr., and others filed motions to dismiss the petition. These motions were overruled by the District Judge and an appeal was taken by movants. While the appeal was pending, Mr. Crowley died and the Syndicate was left without a Trustee. The District Judge appointed a Trustee in the reorganization proceeding to take charge of and conserve the assets, books and records of the Syndicate, pending a determination of the case.

The Court of Appeals of the Fifth Circuit held that the pleadings and proof were insufficient as a basis for reorganization and reversed the case for further proceedings. *Tucker et al vs. Texas American Syndicate, et al*, 170 Fed. (2d) 939.

When the mandate came down the Trustee in the reorganization tendered an amended petition, which the District Court by order dated February 17, 1949, permitted to be filed, reserving the right to consider at a later date the right of the Trustee to file an amended petition and to offer further proof in support of the petition. (R. 10-11.) On June 10 the Judge announced in open court his intention to dismiss the petition by an order to be furnished. (R. 36.)

On July 19, 1949, before a final order had been entered in the reorganization proceeding, respondents J. Morgan Baker, and others, non-resident shareholders in the Texas American Syndicate, filed a suit in equity in the same court in which the bankruptcy proceeding was pending, setting up the involved condition of the Syndicate, the want of a permanent Trustee, the conflicting claims of certificate holders, etc., and prayed, among other things, for the appointment of a receiver for the properties of the Syndicate and the appointment of a Master in Chancery to aid the Court in determining the beneficial ownership of the assets of the Syndicate and the names of the shareholders entitled to participate in the selection of a permanent Trustee. Pursuant to the terms of the Trust Agreement (R. 61-73), various other alleged shareholders intervened in the Baker suit and others intervened in the bankruptcy proceedings, all seeking substantially the same relief as that prayed for by Baker, et al in the equity suit. (R. 37-43.)

The Court set the whole matter down for hearing on September 8, 1949, and directed to be issued a show cause order accordingly. (R. 73.)

The Trustee in the bankruptcy proceeding filed his report (R. 43-50) and also filed a petition for instructions as to the disposition to be made of the books, records, etc., that had come into his hands as Trustee of the Syndicate. In his petition he set up the confusion existing as to the true beneficial owners of the assets of the Trust and those entitled to participate in the selection of a permanent Trustee under the trust indenture which provides for the appointment of a Trustee by the owners of a majority in amount and value of the issued and outstanding shares of said trust estate. (R .)

At the conclusion of the hearing of the Trustee's report and petition for instructions and the prayer of the plaintiffs and intervenors in the equity suit and the intervenors in the bankruptcy proceeding for the appointment of a receiver or custodian of the properties and a Special Master to hear and report to the Court on the status of stock ownership and the names of those entitled to participate in the selection of a permanent Trustee, the Court made and entered an order (R. 96), the substance of which is set out in the opinion of the Appellate Court, 185 Fed. (2d) 863. In this order the District Court directed that the bankruptcy proceeding and the equity receivership suit be consolidated and that the bankruptcy petition, in so far as it sought reorganization, be dismissed, the Court reserving jurisdiction to determine who are the beneficial owners of the assets of the Syndicate and to supervise the election of a Trustee, pursuant to the terms of the trust indenture. That the Trustee theretofore appointed by the Court in the reorganization proceed-

ing continue as such Trustee or Conservator to hold, conserve and protect the assets, books and records of the Syndicate, pending the selection of a permanent Trustee under the trust indenture. The Court called to his aid a Special Master to investigate, hear evidence and report to the Court his findings and conclusions as to the numerous claims of stock ownership of the syndicate as a step toward the delivery of the assets, books and records of the syndicate to one lawfully entitled to receive same. (R. 96-102.) The Appellate Court modified the order and decree as to certain injunctive relief granted, and as so modified affirmed it.

ARGUMENT

The sole ground of jurisdiction relied on in the petition herein is based on the contention of petitioners that the second decision of the Court of Appeals is in conflict with the first decision of that court and that rules of this court require a review of the second decision.

In the first place, there is no such rule of which we have any knowledge; and in the second place, the record does not sustain the assertion of petitioners that there is a conflict between the two decisions. On the first appeal the court held that the pleadings and evidence were insufficient to warrant reorganization of the Syndicate under Chapter 10 of the Bankruptcy Act. On the second appeal the Appellate Court accepted the first decision as correctly declaring the law and in the light of that decision disposed of the Assignments of Error attacking the rulings of the District Court made following the return of the mandate. As previously pointed out, the District Court dismissed the petition in the Bankruptcy Court in so far as a reorganization was sought but retained jurisdiction to pass on the Trustee's account and direct the disposition that should be made of the assets, books and records of the Syndicate in the hands of the Trustee. Instead of appointing a general receiver in the equity suit, as he might have done, he continued the Trustee in the possession of the assets, books and records as a Conservator, pending the selection of a Trustee under the declaration of Trust by those qualified to select a permanent Trustee, in accordance with the terms of

the trust indenture. The procedure followed by the District Court was in accord with Section 246 and 259 of the Bankruptcy Act (11 USCA Secs. 646 and 659) and with such cases as *Smith vs. Central Trust Company*, 4 Cir. 139 Fed. (2d) Fed. 733, and in *re Peer Manor Building Corporation*, 7 Cir. 143 Fed. (2d) 746. The action of the Court in calling to his aid a Special Master to investigate the various claims of shareholders to determine who are the equitable owners of the assets of the Syndicate and entitled to select a Trustee is in accordance with the procedure followed and approved in *Berl vs. Crutcher*, 5 Cir. 60 Fed. (2d) 440 (Cert. denied, 287 U.S. 670). The consolidation of what was left of the bankruptcy matter with the equity suit, both involving the same properties, was in the interest of economy and orderly procedure.

It is respectfully submitted that no reason advanced by the petitioners in support of their petition is sound and that there is no occasion for the review by this court of the decision of the Court of Appeals.

J. Hart Willis

J. HART WILLIS,
J. B. WADE,
L. L. GAMBILL,
Attorneys for Respondents.

WILLIS & LEWIS
ALLEN, GAMBILL & GAMBILL
Of Counsel